absence of a final preemption policy applied in a factual and legal context, we are satisfied that the Commission's preemption policy will not be "felt in a concrete way by the challenging parties." *Abbott Laboratories,* 387 U.S. at 148–49. Because the hardship to parties does not outweigh the institutional interests against judicial review, we hold that petitioners' challenge is unripe.

5. **Refunds by Local Franchising Authorities.** Cable petitioners also contend that the Commission erred in allowing franchising authorities to order refunds to remedy unreasonable basic service rates. *Rate Order,* 8 F.C.C.R. at 5725; *Third Reconsideration,* 9 F.C.C.R. at 4351–52. Petitioners deem significant the fact that Congress expressly contemplated the refund remedy for the cable programming tier, 47 U.S.C. § 543(c)(1)(C), but omitted such express authorization for the basic service tier. *Id.* § 543(b)(5). *Cf. Russello v. United States,* 464 U.S. 16, 23 (1983). But the fact that Congress provided for refunds of "unreasonable" cable programming rates does not mean that the lack of such express authorization for the basic service tier constituted an implicit rejection of refunds as an appropriate remedy. Congress's "failure to prescribe" the refund remedy for basic tier rates "could mean either that no [refunds were] contemplated by Congress, or that Congress left the choice" to the agency whether refunds were appropriate. *General Motors Corp. v. National Highway Traffic Safety Admin.,* 898 F.2d 165, 170 (D.C. Cir. 1990). Because the 1992 Cable Act vests broad authority in the Commission to design "procedures by which cable operators may implement and franchising authorities may enforce the regulations prescribed by the Commission" for ensuring reasonable rates of the basic tier, 47 U.S.C. § 543(b)(5)(A), there can be no doubt that Congress left to the Commission the decision of whether franchising authorities could order refunds. Consequently, because nothing in the 1992 Cable Act precludes the Commission from allowing refunds to remedy unreasonable basic rates, the Commission's decision does not violate the Act. *Cf. New England Tel. & Tel. v. FCC,* 826 F.2d 1101, 1107–08 (D.C. Cir. 1987), *cert. denied,* 490 U.S. 1039 (1989); *Lorain Journal Co. v.*

FCC, 351 F.2d 824, 831 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966) (Commission enjoys broad discretion in selecting remedies).

C. Cities' Challenges

1. Preemption of Basic Tier Agreements. The Commission determined that the 1992 Cable Act preempts franchising authorities from regulating the number and type of channels that must be offered on the basic tier. *Rate Order*, 8 F.C.C.R. at 5738; *First Reconsideration*, 9 F.C.C.R. at 1205–06. The Commission reasoned that Congress meant to preempt such regulation when it specified the "components" of the basic service tier. Section 543(b)(7) provides:

> (A) MINIMUM CONTENTS.—Each cable operator of a cable system shall provide its subscribers a separately available basic service tier to which subscription is required for access to any other tier of service. Such basic service tier shall, at a minimum, consist of the following:
>
> (i) All signals carried in fulfillment of the ["must-carry"] requirements of [47 U.S.C. §§ 534–35].
>
> (ii) Any public, educational, and government access ["PEG"] programming required by the franchise of the cable system to be provided to subscribers.
>
> (iii) Any signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station.
>
> (B) PERMITTED ADDITIONS TO BASIC TIER.—A cable operator may add additional video programming signals or services to the basic service tier. . . .

47 U.S.C. § 543(b)(7); *see Rate Order*, 8 F.C.C.R. at 5738–39; *First Reconsideration*, 9 F.C.C.R. at 1205–09.

We conclude, as did the Commission, that the "particular statutory language at issue, as well as the language and design of the statute as a whole," *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988), require preemption of franchising agreements specifying the contents of the basic service tier. *See Dole v. United Steelworkers of America*, 494 U.S. 26, 41 (1990). Although allowing franchising authorities to enforce basic tier programming requirements would not violate any single provision of the 1992 Cable Act, "the statute, as a whole, clearly expresses Congress' intention" to leave such programming decisions to the cable operators.[19] *Id.* at 42.

The language of the statute leaves little doubt that, apart from the programming requirements enumerated in § 543(b)(7)(A), the cable operators themselves have exclusive control over the programming on the basic service tier. First, by dividing the basic service tier components into "minimum contents" and "permitted additions," Congress defined the minimum *and maximum* of programming possibilities. In other words, § 543(b)(7)(A) describes the programming elements that all systems must offer and § 543(b)(7)(B) lists the universe of possible additions. Because neither subsection (A) nor subsection (B) includes non-PEG programs required by franchising authorities, Congress did not intend to include such programming on the basic service tier. Second, by providing that the basic tier must include *PEG programs* required by the franchise, the 1992 Cable Act suggests that franchising authorities cannot require other types of programs on the basic tier. Third, because the 1992 Cable Act specifically permits cable operators to add programs of their choice to the basic service tier, any programming limitations posed by franchise agreements would conflict with that express statutory authorization.[20] If, for example,

[19] *But see* 47 U.S.C. § 532 (leased access requirement).

[20] The Conference Report, which describes the composition of the basic tier as "all [public access] signals required to be carried under [47 U.S.C. §§ 534 & 535], any public, educational, and governmental access programming, and any signal of any broadcast station provided by the cable operator, as well as other video programming signals *that the cable operator may choose to provide on the basic tier*," CONF. REP. at 60 (emphasis added), underscores that Congress

the franchising authority forbade a cable operator from offering sports programs on its basic tier, the cable operator would be deprived of its statutory authority to "add additional video programming signals or services to the basic service tier." *Id.*[21]

In addition to the language of the statute, preemption of franchising authorities' control over the basic tier effectuates the dual regulatory framework of the 1992 Cable Act, under which franchising authorities have primary responsibility for regulating the basic service tier and the Commission regulates cable programming services. If franchising authorities were allowed to define the content of the basic tier, they could effectively force cable programming services onto the basic tier, thereby depriving the Commission of the jurisdiction that Congress clearly intended it to exercise. *See* 47 U.S.C. § 543(a)(2)(B). In sum, both the "language and the design of the statute as a whole" [22] demonstrate that the 1992 Cable Act preempts franchising authority control over the composition of the basic service tier, with the exception of PEG channels.

The Cities, however, point to other, still-intact sections of the pre–1992 cable statute under which franchising authorities may regulate "services" provided by cable operators as evidence that franchising authorities may control basic tier composition. They first cite 47 U.S.C. § 545(d), which provides that cable operators may rearrange programming between tiers "if the rates for all of the service tiers involved in such actions are not subject to regulation under section

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envisioned cable operator control over basic tier programming, subject only to the minimum statutory requirements.

[21] The Cities' attempt to circumvent this language by arguing that franchise agreements do not interfere with the operator's ability to "add" channels because the operator enters into such contracts "voluntarily" is unconvincing. Programming requirements imposed by a franchising authority as a condition of obtaining a franchise are virtually equivalent to direct government regulation.

[22] *American Scholastic TV Programming,* 46 F.3d at 1177 (citation omitted).

According to the Cities, by expressly authorizing cable operators to reorganize those tiers that are not subject to regulation, § 545(d) implies that cable operators may *not* rearrange the programming of tiers that *do* face rate regulation.

The Commission adequately responded to this argument in its *First Reconsideration*, concluding that § 545(d)'s "affirmative authorization" of tier rearrangement for unregulated services "is not inconsistent with the view ... that, in the regulated environment, the basic tier is to be composed of the broadcast and access channels specified in the statute and such other services 'that the cable operator may choose to provide.' " 8 F.C.C.R. at 1208. Contrary to the Cities' suggestion, the Commission's interpretation does not make superfluous § 545(d)'s affirmative authorization of tier-switching for unregulated services because § 543 defines certain programs that franchising authorities can require to be carried on the basic tier. Reading the two sections in harmony,[23] § 545(d) means that cable operator control over programming on non-regulated tiers may not be constrained by franchising authorities, but franchising authorities may have limited control over one aspect of basic tier programming, namely, the locally mandated PEG channels.

Nor does 47 U.S.C. § 544(b)(2), which authorizes franchising authorities to enforce franchise requirements governing "broad categories of video programming or other services," support the Cities' position. Reading this provision consistently with § 543 leads to the conclusion that franchising authorities may impose standards governing the *overall* service and programming offered by a cable system but may not (with the exception of PEG channels) dictate what programming must be offered on the basic service tier. Because the provisions from the pre-1992 cable statute are not inconsis-

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[23] "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

tent with the provisions of the 1992 Cable Act discussed above, they do not obscure Congress's clear intention in the 1992 Cable Act to preempt local regulation of the components of the basic tier.[24]

2. Requirement of a single basic tier. In its *First Report and Order*, the Commission, citing provisions in the 1992 Cable Act that consistently refer to "basic tier" in the singular, concluded that the statute contemplates that each cable operator must offer "only one basic tier." 8 F.C.C.R. at 5744.[25] The Cities point to an extant definition from the 1984 Act as evidence that the 1992 Cable Act contemplates the existence of more than one basic tier: "[T]he term 'basic cable service' means *any* service tier which includes the retransmission of local television broadcast signals." 47 U.S.C. § 522(2) (emphasis added). The court has previously interpreted the "basic cable service" definition as including all tiers of service that offer broadcast programs, even if such programming is offered on multiple tiers. *See ACLU v. FCC*, 823 F.2d 1554, 1565–66 (D.C. Cir. 1987) (Commission's attempt to limit "basic cable service" to one basic tier "is at odds with [the] definition of that very term contained in the Act itself").

Despite the "basic cable service" definition, however, we conclude that the Commission's single basic tier requirement

[24] Because the 1992 Cable Act clearly preempts state regulation of the basic tier, we need not reach the question whether an agency is entitled to *Chevron* deference when it acts to preempt state law in the absence of statutory authorization. *Compare Oklahoma Natural Gas v. FERC*, 28 F.3d 1281, 1284 (D.C. Cir. 1994), *with California State Bd. of Optometry v. FTC*, 910 F.2d 976, 979–82 (D.C. Cir. 1990).

[25] *E.g.*, 47 U.S.C. § 543(b)(5)(D) (subscribers must "receive notice of the availability of the basic service tier"); *id.* § 543(b)(6) (cable operator must "provide 30 days' advance notice to a franchising authority of any increase proposed in the price to be charged for the basic service tier"); *id.* § 543(b)(7)(A) ("[e]ach cable operator . . . shall provide its subscribers a separately available basic service tier to which subscription is required for access to any other tier of service"); *id.* § 543(b)(7)(B) ("cable operator may add . . . services to the basic service tier").

constitutes a "permissible" interpretation of the 1992 Cable Act. *See Chevron*, 467 U.S. at 843. We agree with the Commission that the 1992 Cable Act, by repeatedly referring to the basic tier in the singular, contemplates one basic tier. *See supra* n.25. Moreover, after the 1992 statutory revisions, the "basic cable service" and "basic service tier" definitions can be readily reconciled. Prior to 1992, the cable statute authorized regulation *only* of basic cable services. *See* 47 U.S.C. § 543(b) (1988). The new rate regulation scheme, however, centers not around "basic cable service," but around the "basic service tier" and the "cable programming tier," terms that were modeled to suit the dual regulatory regime of the 1992 Cable Act—a regime whose structure and terms virtually require a single basic tier. Allowing a cable operator to offer multiple basic service tiers would upset the balance between local and federal regulation. The 1992 Cable Act establishes a regime in which local franchising authorities generally have jurisdiction to implement the rate rules only for the basic service tier while the Commission is solely responsible for cable programming service tiers. *Id.* § 543(a)(2) (1992). Cable operators could upset this balance if they were allowed to designate as "basic service tiers" programming tiers other than the tier provided for in § 543(b)(7) (*i.e.*, tiers that otherwise fall into the statutory definition of "cable programming services," *id.* § 543(*l*)(2)). Considered in the context of the overall statutory scheme, we conclude that the terms "basic service tier" and "cable programming service" effectively channel "basic cable services" into a single tier, thereby modifying rather than negating the "basic cable service" definition. The Commission's interpretation is therefore permissible under *Chevron*.

3. **Settlement rules**. The Commission determined that franchising authorities exercising their regulatory authority under 47 U.S.C. § 543(b) may not settle rate disputes unless the settlement is reasonable and justified by the record created in the course of a settlement:

> [W]e affirm our intention to disallow settlement agreements that are based on factors outside the record of a rate proceeding. Permitting such settlements could po-

> tentially allow franchising authorities to bargain away subscribers' statutory protection against unreasonable rates.... Parties in a rate-setting procedure may, of course, stipulate to particular facts and even the final rate level itself, as long as the basis for each such stipulation is clearly articulated, there is some support for each stipulation in the record, and it does not circumvent our rate regulations.

Third Reconsideration, 9 F.C.C.R. at 4342.

The Cities contend that the Commission "has no basis for summarily eliminating" the settlement option by requiring franchising authorities to develop a record of compliance with the Commission's rate rules. The Cities acknowledge, however, that the Commission "can retain the right to review agreements, just as it has the right to review rate orders generally, thus protecting against abuses." It seems obvious to us that if the Commission is to review settlements in a principled way, it must have some information about the competing claims and their resolution. The Commission's settlement rules do no more than establish a record from which the Commission can assess whether "abuses" have occurred.[26] Because the Commission's settlement rules are

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[26] The Cities make the curious argument that the settlement of rate disputes is not "regulation," but a contractual agreement between the cable operator and the franchising authority. In entering into such "contracts," however, franchising authorities are clearly functioning as regulators; indeed, as consideration for such a "contract," the franchising authority agrees not to pursue unfair-rate proceedings against the operator—a power intrinsic to its regulatory role. In addition, as the Commission points out, the 1992 Cable Act gives the Commission a broad mandate to ensure "reasonable" cable rates, as determined under standards created by the Commission. It does not contain any proviso suggesting that the Commission must approve "unreasonable" rates simply because franchising authorities agree to them. Indeed, the Act suggests otherwise, by requiring the Commission to deny certification of any franchising authority that adopts rate regulations "that are not consistent with the regulations prescribed by the Commission" under the Act. 47 U.S.C. § 543(a)(4)(A).

not contrary to the statute or arbitrary and capricious, we find the Cities' challenge unpersuasive.

4. **Requirement that franchising authorities pay for regulation with franchise fees.** Under the dual regulatory system established by Congress, franchising authorities maintain primary authority for regulating basic rates. 47 U.S.C. § 543(a)(2)(A). The 1992 Cable Act provides that the Commission may exercise jurisdiction only if it "disapproves a franchising authority's certification ... or revokes such authority's jurisdiction" because (1) the franchising authority's rate regulations conflict with the Commission's rate standards promulgated under the Act; (2) the franchising authority lacks the legal power to regulate or the personnel to administer its regulations; or (3) the authority's procedural rules do not provide for a full hearing. *Id.* § 543(a)(4), (6).

The Commission, reasoning that some franchising authorities might desire to engage in rate regulation but lack the legal power or resources to regulate on a local level, concluded that its general mandate to "ensure that the rates for the basic service tier are reasonable" empowered it to regulate basic rates upon the request of such franchising authorities. *Rate Order*, 8 F.C.C.R. at 5675–76. Rather than requiring these franchising authorities to go through a "sham" certification process to establish their lack of power or resources, the Commission decided to allow the authorities affirmatively to request Commission regulation of basic rates. When a franchising authority that collects franchise fees claims financial incapacity, however, the Commission decided to require a showing that the franchising authority cannot afford to regulate:

> [I]n providing that franchising authorities lacking the resources to regulate can affirmatively request FCC regulation of basic cable rates, we will presume that franchising authorities receiving franchise fees have the resources to regulate. Any such franchising authority seeking to have the Commission exercise jurisdiction over basic rates will be required to rebut this presumption with evidence showing why the proceeds of the

> franchise fees it obtains cannot be used to cover the cost of rate regulation.

Id. at 5676. The Commission later clarified that the franchising authority need not dedicate all of its franchise fees to rate regulation, but must establish that "franchise fees cannot reasonably be expected to cover the present regulatory program *and* basic rate regulation." *Third Reconsideration,* 9 F.C.C.R. at 4332.

The Cities agree that the Commission should regulate rates when justified by a franchising authority's financial inability to do so. They maintain, however, that the Commission cannot *require* franchising authorities to use their franchise fees for regulatory purposes because 47 U.S.C. § 542(i) prohibits the Commission from "regulat[ing] the amount of the franchise fees paid by a cable operator, or regulat[ing] use of funds derived from those fees." The Cities argue, in effect, that the Commission must assume regulatory jurisdiction any time a franchising authority requests it to do so because of a lack of resources.

The Commission rejected this contention on the basis that its franchise fee requirement "is not a regulation of 'the use of funds derived from such fees' within the meaning of [47 U.S.C. § 542(i)], but it is merely a test for determining which regulatory efforts should receive the benefit of the Commission's limited resources, based on the importance placed on that regulation by the respective franchising authority." *Third Reconsideration,* 9 F.C.C.R. at 1084. In other words, the Commission reasons that it is not directly regulating the use of franchise fees, but is instead using the existence of such fees to decide whether a franchising authority needs the Commission's support because it cannot afford to regulate itself.

The Commission nevertheless erred in adopting a presumption that franchising authorities receiving franchise fees have the resources to regulate because the presumption implies that the franchising authority must use any available franchise fees for purposes of rate regulation. In deciding that it had the authority to regulate basic tier rates upon the request of franchising authorities that lacked the resources to regulate, the Commission relied on its "broad mandate over basic service rates: 'The Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable.'" *Rate Order*, 8 F.C.C.R. at 5675 (quoting 47 U.S.C. § 543(b)). If this provision is interpreted (as it reasonably can be) to authorize the Commission to regulate rates in franchise areas where the government cannot afford regulation, then under its mandatory terms the Commission *must* regulate in all such areas. Although the Commission could also have reasonably concluded that this provision does not in any way authorize it to step in when franchising authorities cannot afford to regulate, the provision cannot possibly support the Commission's present view that it allows the Commission to step in at its discretion. In addition, even if the Commission could consider relevant criteria in determining whether a franchising authority can afford to regulate, it could not use those criteria to accomplish indirectly what § 542(i) directly proscribes. Notwithstanding the explanation that its rule is nothing more than a test focused on making the most efficient use of limited Commission resources, *Third Reconsideration*, 9 F.C.C.R. at 4333, the effect of the Commission's test is to require that such franchise fees be dedicated to cable rate regulation purposes. A test that ties the assumption of the Commission's responsibilities to a particular use of franchise fees is inconsistent with the statute. For both of these reasons, the Commission's interpretation of 47 U.S.C. § 543(b), allowing it to assume regulation of the basic tier only upon a showing by the franchising authority that its franchise fees are insufficient to cover the costs of regulation, is impermissible.

II.

A. **Regulation of single tier cable operators.** Petitioner Armstrong Holdings, Inc., filed an individual brief contesting the Commission's regulations as applied to "single-tier operators." Armstrong offers all of its subscribers a single tier rather than separate basic and cable programming tiers. According to Armstrong, the Commission's method for determining reasonable rates under the *Second Reconsideration* is arbitrary and capricious because it penalizes single-tier systems. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 F.C.C.R. 4119 (1994) ("*Second Reconsideration*").

As the Commission notes, because Armstrong did not raise the issue before the Commission in the first instance, it is precluded from raising it on appeal. *See Florida Cellular Communications Corp. v. FCC*, 28 F.3d 191, 200–01 (D.C. Cir. 1994); *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 739 (D.C. Cir. 1976). Armstrong could have raised the single tier issue either in comments or in a petition for reconsideration. *See Southern Indiana Broadcasting, Ltd. v. FCC*, 935 F.2d 1340, 1342 (D.C. Cir. 1991); 47 U.S.C. § 405(a). Although the court has recognized exceptions to this prudential "exhaustion" requirement, *see Southern Indiana*, 935 F.2d at 1342; *Office of Communication of the United Church of Christ v. FCC*, 779 F.2d 702, 706–07 (D.C. Cir. 1985), there is no occasion to apply such an exception here. Armstrong offers no reason for its failure to raise the single tier issue before the Commission, and because no other party presented the issue, the Commission had no opportunity to address it. *Compare Office of Communication of the United Church of Christ*, 779 F.2d at 706–07.

Armstrong does not maintain that it raised the single tier issue with the Commission in comments or in a motion for reconsideration of the *Second Reconsideration* order. Instead, Armstrong points out that its officers and counsel have been engaged in discussions with the Commission "specifically to discuss the impact of the revised [rate] formula on single tier operators." Armstrong notes further that it has filed a waiver request, which is currently under consideration by the Commission. Even if the waiver request gives the Commission sufficient opportunity to consider the impact of its rules on single tier operators, the Commission has not concluded its review and the court does not have the benefit of the agency's decision and reasoned explanation.

For these reasons, the single tier issue is not properly before the court. *See Coalition for the Preservation of Hispanic Broadcasting v. FCC*, 931 F.2d 73, 76–77 (D.C. Cir.), *cert. denied*, 502 U.S. 907 (1991); *Alianza Federal*, 539 F.2d at 739.

B. Small Cable Business Association's Challenges. Intervenor Small Cable Business Association ("the Association") raises the additional challenge that the *Second Reconsideration* is arbitrary and capricious because it fails to comply with the Small Business Act ("SBA") [27] and Regulatory Flexibility Act ("RFA").[28] None of the petitioners raised these arguments in their petitions for review. Because intervenors may address only issues raised by the parties, *see Illinois Bell Telephone Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990), the RFA and SBA challenges are not properly before the court. Although the court may, in its discretion, address challenges raised only by intervenors, "only in 'extraordinary cases' will we depart from our general rule." *National Association of Regulatory Utility Commissioners v. ICC*, 41 F.3d 721, 730 (D.C. Cir. 1994).[29] In the instant case, the Association participated in the agency proceedings and had the opportunity to file an independent petition for review of the Commission's alleged rejection of the Association's SBA and RFA claims. Having foregone that opportunity, the Association is barred from protesting the Commission's regulations on grounds not presented by the petitioners.

[27] 15 U.S.C. §§ 631–656.

[28] 5 U.S.C. §§ 601–612.

[29] *Synovus Fin. Corp. v. Board of Governors of the Fed. Reserve Sys.*, 952 F.2d 426, 433 (D.C. Cir. 1991), in which the court decided to reach an intervenor's claim not raised by petitioners, is distinguishable because, among other things, the *Synovus* intervenor had prevailed before the agency on grounds other than the ones that it had argued, and thus had neither opportunity nor reason to petition for review. Only through an intervention motion could it preserve the arguments that it had raised with the agency. *See Synovus*, 952 F.2d at 433–34; *see also NARUC*, 41 F.3d at 730.

The cable petitioners do mention the SBA and RFA arguments in a short two-sentence footnote in their brief. However, the footnote neither explains nor develops the statutory challenges, noting only that "[t]he intervenors' brief will discuss this issue." This terse reference in a complex regulatory case is insufficient to raise an issue unrelated to petitioners' other challenges and not discussed elsewhere in their briefs or even mentioned in their petition for review. *See Railway Labor Executives Ass'n v. United States R.R. Retirement*, 749 F.2d 856, 859 (D.C. Cir. 1984); *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983); *cf. Human Development Ass'n v. NLRB*, 937 F.2d 657, 661 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1512 (1992). Nor is the cable petitioners' general challenge under the Administrative Procedures Act sufficient to invoke the RFA and SBA issues. *See Illinois Bell*, 911 F.2d at 786. In view of the different perspectives and concerns of cable petitioners such as Time Warner, the small business intervenor either knew or should have known that it was likely to be the only party to press the SBA and RFA issues before the agency, and similarly, to raise the concerns on appeal.[30] Therefore, the Association's challenges as intervenor to the Commission's regulations under the SBA and RFA are not properly before the court.[31]

Conclusion. Accordingly, we grant cable petitioners' petition with respect to the Commission's interpretation of the

[30] It does not appear from the record before the court that any petitioner (other than the Association) raised the SBA and RFA issues in the proceedings before the Commission.

[31] Although the Commission did not incorporate SBA size standards in its initial *Rate Order* or the regulations at issue here, it has since initiated a notice and comment process to determine whether to apply SBA size standards on a going-forward basis. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Fifth Order on Reconsideration and Notice of Proposed Rulemaking, 9 F.C.C.R. 5327 (1994). Thus, the Association may, at least prospectively, obtain the relief it seeks.

overbuild definition for effective competition, the tier buy-through provision, and the uniform rate structure provision; we grant the Cities' petition with respect to the Commission's attempt to regulate the use of franchise fees; and otherwise we deny the petitions of the cable petitioners and the Cities, except for cable petitioners' preemption contention, which we dismiss as unripe. Finally, we dismiss the petition filed by Armstrong.

Opinion dissenting in part filed by *Circuit Judge* RANDOLPH.

RANDOLPH, *Circuit Judge, dissenting in part:* I disagree with the majority's decision insofar as it rejects the Federal Communications Commission's interpretation of 47 U.S.C. § 543(*l*)(1)(B).

Here is § 543(*l*)(1)(B) in its entirety:

As used in this section—

(1) The term "effective competition" means that—

* * *

> (B) the franchise area is—
>
> (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and
>
> (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area....

The immediate interpretative question is whether the "multichannel video programming distributors" in § 543(*l*)(1)(B)(ii) are only those mentioned in § 543(*l*)(1)(B)(i)—unaffiliated, having comparable programming, and offering it to 50 percent of households. The question is of considerable regulatory importance. Distributors are immune from the Commission's ratemaking rules if they are subject to "effective competition," if they are, in other words, in a franchise area meeting § 543(*l*)(1)(B)'s description. Under the Commission's reading, effective competition does not exist unless the distributors satisfying part (i) are the ones whose subscribers add up to more than 15 percent under part (ii). The majority, on the other hand, views it as irrelevant whether the more-than-15 percent consists of distributors who satisfy (i); any distributors will do.

To appreciate the difference, consider an area where one distributor has signed up 84 percent of the households. One of its competitors offers comparable service to more than half of the households, but only 6 percent subscribe. Two other minor players in the area each have a 5 percent share. In this example, the Commission would not find "effective competition." My colleagues would, because the "multichannel video programming distributors" mentioned in (ii) are not confined to any particular category.

In examining these competing interpretations, we must first decide whether § 543(*l*)(1)(B) is employing what, in the science of language and the mind, is called "co-reference." Professor Pinker gives this illustration: "Say you start talking about an individual by referring to him as *the tall blond man with one black shoe.* The second time you refer to him in the conversation you are likely to call him *the man;* the third time, just *him.* But the three expressions do not refer to three people or even to three ways of thinking about a single person; the second and third are just ways of saving breath." STEVEN PINKER, THE LANGUAGE INSTINCT 79–80 (1994).

Now look at § 543(*l*)(1)(B). The first thing I notice is that if the class of distributors mentioned in (ii) is in no wise limited by the class of distributors comprising (i), the statute appears rather senseless. My reasoning is this. The provision describes effective competition. There cannot be competition if all the distributors in the area are divisions of the same company. Congress knew this. That is why you cannot get beyond (i) unless the distributors are "unaffiliated." While (ii) does not expressly contain that qualifier, one would think the distributors in (ii) must also be "unaffiliated." Why? Because it would be absurd to think that when one division of a company holds an 84 percent share of the market and another division of the same company holds 16 percent, there would be "effective competition." (To simplify analysis, I have assumed that an unaffiliated distributor offered service to everyone, thereby satisfying (i), but no one subscribed.) Notice also that (i) requires that the competing distributors offer "comparable service," while (ii) does not mention this qualifier. The idea behind (i) must be that "effective competition" entails head-to-head competition. When the dominant distributor offers 50 channels and the nondominant distributor offers only 5, subsection (i) is not satisfied. The service is not "comparable." *See* 47 C.F.R. § 76.905(g). If the "comparable service" qualifier in (i) does not limit the class of distributors in (ii), the result strikes me as exceedingly odd: "effective competition" could be said to exist although those making up the 15 percent share under (ii) consisted solely of distributors offering services markedly inferior to the dominant distributor's.

If my analysis thus far is correct, the majority may be quite mistaken in saying that subsection (i) "does not limit in any way the cable companies to be considered in aggregating subscribership" under subsection (ii). Since (i) appears to limit (ii) at least in regard to the affiliation qualification, it is plausible to suppose that it also limits (ii) regarding the 50-percent-offering qualification—that what we have here is indeed co-reference. In other words, (ii) would be interpreted as if it said: "the number of households subscribing to programming services offered by [*such* or *those* or *said*, or perhaps even just *the*] multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area."

One way of testing the plausibility of this reading, which is the reading embraced by the Commission, is to see how others presumably familiar with the language of the statute read it. *See* A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71, 77 (1994). The House Committee that drafted § 543(l)(1)(B) stated in its report that "effective competition" would exist if "at least two sources of multichannel video programming are offered to 50 percent of households and subscribed to by at least 15 percent of households." H.R. REP. No. 628, 102d Cong., 2d Sess. 89 (1992). The Conference Committee explained that effective competition would be present if a franchise area "is served by at least two unaffiliated [distributors] offering comparable video programming to at least 50 percent of the households in the franchise area, and at least 15 percent of the households in the franchise area subscribe to the smaller of these two systems." H.R. CONF. REP. No. 862, 102d Cong., 2d Sess. 62 (1992).

Both statements tend to support the Commission's reading; they assume that the 15 percenter in (ii) is the same distributor as one of the 50 percenters in (i). I do not mean to place great significance on these statements. The Commission forthrightly acknowledged that "[n]either report addresses the specific issue confronting us here: how to measure the subscribership if there is more than one competitive multichannel video programming distributor in the franchise area." *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 F.C.C.R. 5631, 5664 n.116 (1993).

Where does all this lead? I think the language of § 543(*l*)(1)(B) yields no firm conclusion, certainly no "plain meaning" as the majority supposes. True, unlike subsection (i), subsection (ii) contains no modifiers of "multichannel video programming distributors." But to say that the distributors of (ii) are therefore not limited to the distributors of (i) is to beg the question. Does the absence of a "such" or a "those" or a "said" or a "the" signify a difference between the classes of distributors in the two subsections, or is this merely inartful drafting? Would a congressional reader necessarily come away with the majority's view of the statute? With all due respect to my colleagues, the only honest answer to these questions is, in my view, "Maybe, and maybe not." Given this state of affairs, the Commission's plausible interpretation, an interpretation based on the sort of policy choice the Commission is entitled to make, should have carried the day.